IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 929 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KISHOR SHAMJI PATEL (KHUNT)

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 929 of 2001

MR BC DAVE for MS MANOJ S JOSHI, advocate for appellant.

MS NANDINI JOSHI, APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE H.H.MEHTA

Date of decision: 26/04/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

The appeal was admitted to final hearing vide order dated April 16, 2002 and notice as to bail was issued to the learned A.P.P. making it returnable on April 24, 2002. Having regard to the facts of the case and in view of the joint request made by the learned counsel for the parties, the appeal itself is taken-up for final hearing today.

2. By means of filing this appeal under section 374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated October 16, 2002, rendered by the learned Sessions Judge, Rajkot District, Rajkot, in Sessions Case No. 102/98, by which he is convicted under section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act for short) and is punished with R.I. for 10 years and fine of Rs. 1 lac, i/d. R.I. for two years.

3. Mr. Nirmalsinh Ravubha Jadeja was discharging duties at the relevant time as a Police Sub Inspector of Bhaktinagar Police Station, Rajkot City. When he was on routine patrolling on May 13, 1998 along with police head constable Ganpatsinh, police constable Indrajitsinh etc., he had come near Nilkanth Talkies and found the present appellant moving in suspicious circumstances. On seeing the police personnel, the appellant had made an attempt to escape from the place of incident, but was apprehended by P.S.I. Mr. Nirmalsinh Jadeja and other police personnel. On being asked, the appellant had disclosed his name as Kishor Shamji Patel (Khunt), resident of Kotharia Main Road, Rajkot. A search of his person was conducted in presence of panch witnesses Pratappbhai Sajubha Jhala and Nareshbhai Lakhubhai and on search, 25 small packets duly tied with thread were recovered from the appellant. The substance found from the appellant was looking like a narcotic substance and in order to confirm this doubt, police constable Navalsinh was despatched to call an officer of Forensic Science Laboratory ("F.S.L." for short), Rajkot at the spot. Further, police constable Indrajitsinh was sent to police station for collecting material needed for sealing the substance. At about 1.10 hours, officer of F.S.L. had come at the place of the incident and after examining the substance, had concluded that the substance recovered, was narcotic substance commonly known as brown sugar. Meanwhile, Hasmukhlal Raghvaji Soni was requested to come to the place of incident for weighing the substance recovered from the appellant. On weighing, Hasmukhlal had found that the weight of the substance recovered was

1200 milligrams. Thereafter the substance recovered was sealed with the help of sealing material and slips containing signatures of panch witnesses etc. were pasted on it. The panchnama was prepared on the spot and thereafter the appellant was arrested, as he could not produce any licence or permit authorising him to possess the narcotic substance. The substance sealed was entrusted to Dhirajlal Govindji Jogela in a sealed condition, who had subsequently handed over the same to police constable Gaurishanker Dayashanker Trivedi, who in turn, had handed over to the officer of F.S.L., Junagadh for chemical analysis. P.S.I. Mr. Nirmalsinh had lodged F.I.R. and forwarded his report to his immediate officer i.e. Deputy Commissioner of Police, Rajkot. The investigation of the case was handed over to Jaysukhlal Karshanji Borisagar, who had recorded statements of the witnesses and collected report from F.S.L. Junagadh. On conclusion of the investigation, report under section 173 of the Code of Criminal Procedure was submitted in the Sessions Court, Rajkot District, Rajkot.

3. The learned Judge had framed charge at Exh.3 against the appellant of the offence punishable under section 21 of the NDPS Act. The charge was read over and explained to the appellant, who had not pleaded guilty to the same and claimed to be tried. The prosecution had, therefore, examined; (1) Pratapbhai Sajubha Jhala,PW.1 Exh.9, (2) Nareshbhai Lakhubhai, PW.2 Exh.13, (3) Police Constable Gaurishanker Dayashanker Trivedi, PW.3 Exh.14, (4) P.s.I. Mr. Nirmalsinh Ravubha Jadeja, PW.4 Exh.21, (5) Hasmukhlal Raghavjibhai Soni, PW.5 Exh.27, (6) Unarmed Police Constable Asvingiri Natvargiri, PW.6 Exh.28, (7) A.S.I. Dhirajlal Govindbhai Jogela, PW.7 Exh.33, (8) PSI Abidali S.Kadari, PW.8 Exh.34, and (9) investigating officer Jaysukhlal Karshanji Borisagar, PW.9 Exh.37, to prove its case against the appellant. The prosecution had also produced documentary evidence, such as, F.I.R. lodged by P.S.I. Mr. Jadeja at exh.22, report to Police Inspector made by PSI Mr. Jadeja on May 13, 1988 at exh.23, panchnama of place of incident at exh.10, yadi sent to scientific officer, FSL, Rajkot city exh.24, report forwarded to the Deputy Commissioner of Police by PSI Mr. Jadeja exh.25, police station diary entry exh.29, extracts of sending muddamal for chemical analysis to F.S.L. Junagadh exh.39, receipt of muddamal issued by FSL, Junagadh to P.I. Bhaktinagar Police Station exh.38, report of chemical analysis etc., in support of its case against the appellant.

4. After recording of evidence of prosecution witnesses was over,the learned Judge had explained to the

appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement as required by section 313 of the Code of Criminal Procedure. In his further statement, what was contended by the appellant was that as he had refused to pay the amount to constable Ganpatsinh, which was demanded by him as illegal gratification, he was falsely involved in the case. However, the appellant had not examined any one in his defence. On appreciation of evidence adduced by the prosecution, the learned Judge held that the evidence of police personnel examined in the case was reliable as well as cogent and proved that the appellant was found in possession of 1200 milligrams of brown sugar without pass or permit on May 13, 1998. The learned Judge held that the provisions of section 42 and section 50 of the NDPS Act were not applicable to the facts of the present case, as search of person of the appellant had taken place without any prior information or intimation and, therefore, the appellant was not entitled to be acquitted on the ground that there was breach of provisions of section 42 and section 50 of the Act. In view of the above referred to conclusions, the learned Judge has convicted the appellant under section 21 of the NDPS Act, 1985 and imposed punishment which is referred to earlier, by judgment dated October 16, 2001, giving rise to the present appeal.

5. Mr. B.C.Dave, learned counsel for Mr. M.S.Joshi, learned advocate for the appellant submitted that the panch witnesses have not supported the police personnel and, therefore, the prosecution case ought to have been disbelieved by the learned Judge. It was argued that the mandatory provisions of section 42 of the Act are also not complied with by P.S.I. Mr. Jadeja and, therefore, judgment impugned in the appeal should be set aside. What was emphasised was that in view of the provisions of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001, which are applicable to the facts of the present case, the contravention involves small quantity and, therefore, having regard to the provisions of the amended section 21 of the Act, R.I. for a term imposed on the appellant could not have extended beyond six months or with fine of ten thousand rupees and, therefore, the sentence imposed on the appellant should be suitably reduced having regard to the provisions of section 41 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001. The learned counsel further pleaded that the appellant has undergone by this time imprisonment of 3 years, 11 months and 7 days i.e. more than what is prescribed under the Amended Act and, therefore, even if the Court does not

find merits in the appeal, the appellant should be ordered to be released from jail immediately and to that extent, the appeal should be allowed.

6. Ms. Nandini Joshi, learned A.P.P. for the State contended that merely because the panch witnesses have not supported the prosecution case, does not mean that the reliable testimony of police personnel becomes doubtful and as the learned Judge, who had advantage of observing demeanour of the witnesses, has relied upon the evidence of police officers examined in the case, the appellant should not be acquitted on the ground that the prosecution case is not supported by the panch witnesses. It was argued that the person of the appellant was searched while P.S.I. Mr.Jadeja was on patrolling duty in usual course and that too from a public place and, therefore, provisions of section 42 of the NDPS Act are not applicable to the facts of the present case at all. What was emphasised was that having regard to the nature of offence committed by the appellant, it cannot be said that the learned Judge has committed an error in imposing punishment of R.I. for 10 years and fine of Rs.1 lac and there being no substance in the appeal, the same should be dismissed.

7. We have considered the submissions advanced at the Bar and reappreciated the whole evidence on record because the deposition of the witnesses examined in the case and the documents produced by the prosecution have been brought to our notice by the learned counsel for the appellant. The contention that the panch witnesses have not supported the case of the prosecution and, therefore, the appellant is entitled to be acquitted, has no substance. A bare reading of the evidence of P.S.I. Mr. Jadeja makes it evident that when he was on patrolling duty in the company of other police officers, he had searched the person of the appellant as he was found moving in suspicious circumstances. His evidence further establishes that heroin weighing 1200 milligrams was recovered on search of person of the appellant. The evidence of P.S.I. Mr. Jadeja gets corroboration from the evidence of police constable Mr. Gaurishanker Dayashanker Trivedi as well as that of unarmed police constable Ashvingiri Natvargiri. The record further shows that the officer of F.S.L. was summoned at the place of incident and on examination, he had also found that the substance recovered from the person of the appellant was a narcotic substance. We may state that the report of the Chemical Analyser indicating that the substance analysed was heroin, is not disputed by the defence. It is true that the panch witnesses have not supported the prosecution case. However, we find that

the evidence of panch witnesses to the effect that their signatures were obtained on a prepared panchnama does not inspire confidence of the Court at all. Merely because they have not supported the prosecution case that by itself cannot be treated as a ground to disbelieve the evidence of police officer, which is otherwise found to be trustworthy as well as reliable and supported by contemporaneous documents. In this regard, it would be advantageous to refer to the decision of the Supreme Court in Aher Raja Khima v. State of Saurashtra, AIR 1956 SC 217, wherein it is ruled that the presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. What is laid down for the guidance of the Courts in the Country is that an attitude to distrust and suspect a police officer without good ground could do neither credit to the magistracy nor good to the public and it can only run down the prestige of the police administration. After going through the evidence of police officers, who are examined in the case, we are of the firm opinion that the prosecution case cannot be disbelieved merely because the so-called independent witnesses have not supported the prosecution case. We further find that the evidence of police officers gets corroboration from the evidence of Hasmukhlal Raghavjibhai Soni, PW.5 Exh.27, who had come to the place of incident and weighed the substance recovered from the person of the appellant. Merely because the panch witnesses have not supported the case of the prosecution, the case of the prosecution need not be thrown over board as unreliable. It must be realised that the phenomenon of panch witnesses turning hostile to the prosecution is not unknown and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of reliable police officers and other independent witnesses, in theory, it would be giving a right of veto to the panchas so far as the question of culpability of an accused is concerned. There is no law that a finding as to the proper recovery and seizure cannot be based solely upon the evidence of the investigating officer even if the witnesses to that effect have turned hostile to the prosecution. As indicated earlier, we have examined the evidence of P.S.I. Mr. Jadeja and other police officers, who were with him when the person of the appellant was searched and to us, it inspires confidence. We, therefore, accept

his testimony and consequently hold the seizure of substance well proved. Thus, there being no substance in the first contention, the same is hereby rejected.

8. The plea that the provisions of section 42 of the N.D.P.S. Act are not complied with and, therefore, judgment impugned in the appeal should be reversed, has no merits. The evidence of P.S.I. Mr. Jadeja coupled with the evidence of other police officers, who were with him, would show that they were on usual patrolling and had searched the person of the appellant, as he was found moving in suspicious circumstances. The evidence further establishes that on search of the person of the appellant, 1200 milligrams of heroin was recovered by the police officers. Section 42 of the Act would apply when the offending article is found from a building or a conveyance or a private place. This is so in view of law laid down in, (1) Aslambhai Ibrahimbhai Memon & Anr. v. State of Gujarat, 1990 Criminal Law Journal 1787, (2) Sayar Puri v. State of Rajasthan, (1998) 7 SCC 441, and (3) Ravishankar Bhagwatiprasad Mishra v. State of Gujarat, 2000(1) GLR 137. Therefore, the contention based on breach of the provisions of section 42 cannot be upheld.

9. However, we find that there is substance in the argument advanced by the learned counsel for the appellant, which is based on the amended provisions of the Act. The Parliament has enacted the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001. Section 41 sub-section(1) of the Amending Act reads as under :-

"41(1) : Notwithstanding anything contained in sub-section(2) of section 1, all cases pending before the courts or under investigation at the commencement of this Act, shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence.

Provided that nothing in this section shall apply to cases pending in Appeal."

The Ministry of Finance (Department of Revenue) has issued Notification dated September 27, 2001 in exercise of the powers conferred by sub-section(2) of section 1 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001, appointing October 2, 2001 as the date on which the said Act has come into force in the whole of India. In the present case, the trial against the appellant had concluded on October 16, 2001 and before that date, the provisions of the Amending Act had come into force. Therefore, in view of the provisions of section 41 of the Amending Act, there is no manner of doubt that the case of the appellant ought to have been disposed of in accordance with the provisions of the Principal Act as amended by the Amending Act and the question of punishment ought to have been considered in the light of the amended section 21 of the Act. Section 21, after new amendment, reads as under :-

"21. Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable :-

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity, lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term shall not be less than ten years, but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees, but which may extend to two lakh rupees.

Provided that the court may, for reasons

to be recorded in the judgment, impose a fine exceeding two lakh rupees."

In exercise of the powers conferred by clauses (viia) and (xxiiia) of section 2 of the NDPS Act, 1985 and in supersession of Ministry of Finance, Department of Revenue Notification SO 527(E) dated 16th July, 1996, the Central Government has, by a Notification SO.1055(E) dated October 19, 2001, specified the quantity mentioned in columns 5 and 6 of the Table prescribed below it, in relation to the narcotic drug or psychotropic substance mentioned in the corresponding entry in columns 2 to 4 of the said Table, as the small quantity and commercial quantity respectively for the purpose of the said clauses of that Section. As per the table, so far as heroin is concerned, the small quantity specified is 5 grams; whereas commercial quantity specified is 250 grams. Therefore, there is no manner of doubt that what was found from the possession of the appellant was less than small quantity of heroin and the contravention involves quantity lesser than small quantity. Therefore, the rigorous imprisonment which can be imposed on the appellant could not have extended beyond six months or with fine which could have extended beyond ten thousand rupees. The learned Judge has proceeded on the footing that the provisions of the unamended Principal Act are applicable to the facts of the present case. Though the appellant was heard on the aspect of quantum of punishment, it could not be pointed out on his behalf that the case would be governed by the amended provisions of section 21 of the Act and that the punishment could not have extended beyond rigorous imprisonment for six months. Having regard to the amended provisions of the Narcotic Drugs and Psychotropic Substances Act, we are of the opinion that the learned Judge was not justified in imposing the minimum punishment as prescribed under the unamended Principal Act and, therefore, the punishment imposed on the appellant deserves to be reduced suitably. The learned A.P.P. has made available jail remarks sheet of the appellant for perusal of the Court. It indicates that the appellant has undergone sentence of 3 years, 11 months and 17 days with set off and actual imprisonment of 6 months and 13 days. Thus, there is no manner of doubt that the appellant has undergone sentence more than prescribed under the amended provisions of section 21 of the Act and, therefore, a case is made out to issue direction to the jail authorities to release the appellant from jail immediately, unless his presence is needed with reference to any other case.

For the foregoing reasons, the appeal partly succeeds. The decision, which is impugned in the appeal,is upheld on merits, but it is held that the appellant is liable to be convicted under the amended provisions of section 21 of the Act. Accordingly, the appellant is punished with R.I. for six months and fine of Rs. 1000/- (Rupees one thousand) i/d. R.I. for 3 months. As the appellant has undergone sentence of 3 years, 11 months & 17 days, we hold that he has completed the term of imprisonment imposed by this Court. Accordingly, the jail authorities are directed to release the appellant from jail, unless his presence is needed with reference to any other case. The appeal accordingly stands allowed. Muddamal to be disposed of in terms of directions given in the impugned judgment. D.S.Permitted.

(J.M.Panchal,J.)

(H.H.Mehta,J.)

(patel)